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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

NO. 70-353

B. FRANK CAMP, *Petitioner,*

vs.

STATE OF ARKANSAS, *Respondent.*

PETITIONER'S REPLY TO RESPONSE OF THE STATE OF ARKANSAS

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1. The State has made no attempt to defend the propriety of the Prosecuting Attorney's closing argument. The response to the Petition for Certiorari is based only on the fact that Petitioner's trial counsel requested an admonition to the jury to disregard the improper argument after the argument had been concluded, instead of interrupting the argument to make an objection immediately.

2. There is no question that a state may validly

adopt a rule of procedure under which an argument must be objected to, or a cautionary instruction requested, before the jury retires to deliberate upon its verdict. That (and only that) is the holding of *Jones v. State*, 248 Ark. 694, 453 S.W. 2d 403 (1970), upon which the response places its major reliance.

The other two Arkansas authorities cited in the response likewise fail to sustain the State's position. In *Stinson v. State*, 125 Ark. 339, 189 S.W. 49 (1916), as in *Jones*, the instruction that the Court refused to consider was requested only after the jury had retired to consider its verdict. The holding of *Bell v. State*, 120 Ark. 530, 180 S.W. 186 (1915), is summarized as follows in paragraph 25 of the syllabus:

> It is the duty of appellant to object to improper argument of the prosecuting attorney, at the time the same is made, when the argument is not supported by any testimony offered in evidence, unless the argument is so flagrant that it would be reversible error for the Court, on its motion, to fail to exclude the argument.

The argument for the Prosecuting Attorney at the trial in the instant case did not merely go beyond the testimony; it directly infringed upon a precious constitutional right guaranteed by the Fifth Amendment. As is shown by the failure of the State to attempt to defend it, it was flagrantly improper.

Bell certainly does not stand for the proposition that the request here for a cautionary instruction was not timely made.

3. The important fact is that Petitioner's request for a cautionary instruction was made before the jury retired, immediately upon the conclusion of the Prosecutor's closing argument, and at a time when the jury could have been admonished with no risk of confusion. Any imagined justification for a rule of state procedure that finds a waiver of a federal constitutional right in such a situation is too anemic to override Petitioner's right to have the state courts consider on its merits his federal constitutional claim.

WHEREFORE, Petitioner respectfully renews his request that a Writ of Certiorari be granted to the Supreme Court of Arkansas.

Respectfully submitted,

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